

**SATVENDER SINGH PIRTHPAR SINGH
v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
AHMAD ZAIDI IBRAHIM JCA
SM KOMATHY SUPPIAH JCA

[CRIMINAL APPEAL NOS: B-05(M)-282-08-2021
& B-05(M)-283-08-2021]
26 APRIL 2024

Abstract – (i) Section 402 of the Criminal Procedure Code requires an accused person who wishes to raise the defence of alibi to put it up as soon as possible, and give the names of witnesses who saw him at the crucial time to enable the police to investigate immediately after the incident as memories fade with time. If he makes the disclosure at a belated stage, then he cannot expect any help from the police as it becomes difficult to trace the witnesses and check the veracity of his version of the facts. In such a situation, a plea of alibi can become unsustainable; (ii) Failure of a trial judge to specify or otherwise indicate under which limb of s. 300 of the Penal Code the prosecution had proven the charges against an accused constitutes a serious error as the accused would be prejudiced and denied a fair trial. Absent such an indication, an accused person would be deprived of the notice of the case he has to answer in his defence.

CRIMINAL LAW: Murder – Penal Code, s. 302 – Conviction and sentence – Appeal against – Murder of wife and child – Whether there was credible evidence on cause of child's death – Whether conviction for murder of child safe – Whether there was evidence of forced entry into home where bodies of wife and child found – Defence of alibi – Whether sustainable – Criminal Procedure Code s. 402 – Failure to indicate which limb of s. 300 of Penal Code prosecution had proven charges – Whether a serious omission – Whether accused found guilty of lesser charge of culpable homicide – Whether convicted on reduced charge under s. 304(a) of Penal Code

CRIMINAL PROCEDURE: Defence – Alibi – Charge for murder of wife and child – Whether defence of alibi raised immediately after incident – Delay of three years and lack of information – Whether difficult for police to check veracity of information – Whether defence of alibi failed – Penal Code, s. 302 – Criminal Procedure, s. 402

The appellant was convicted and sentenced to death by the High Court, for two offences under s. 302 of the Penal Code ('PC') for the murder of his wife ('Kamaljit') and his six month old daughter ('Ishlyn') at their home. Dissatisfied with the two decisions, the appellant appealed. On the morning of 14 April 2016, the appellant's family members became anxious when

- A Kamaljit failed to show up at the Sikh temple as prearranged. The appellant's father ('PW15') drove over to the appellant's home and found the bodies of Kamaljit and Ishlyn in one of the bedrooms. Kamaljit had strangulation marks on her neck and was on the floor whilst Ishlyn was on the bed. There were pillows and a milk bottle next to Ishlyn. The appellant was not at home at the time. The appellant was arrested the same day and later charged with the murder of Kamaljit and Ishlyn. He maintained he had left home at 3.55am on the morning in question and was not at home when his wife and daughter were killed. It was the prosecution's case that the appellant had killed Kamaljit and Ishlyn and then staged the crime scene to look like a robbery. The prosecution's case against the appellant was, however, based on circumstantial evidence as there was no eyewitness. PW10, the appellant's immediate neighbour, stated that on the morning of the incident, at around 3.30am he came out of the house to have a smoke. Whilst smoking, he saw the appellant come out of his house but was surprised to see him dash inside on seeing him. PW10's evidence was corroborated by his brother PW9 who arrived home around 4.30am that morning. He testified that the appellant and Kamaljit's cars were still parked outside their house at this time. The pathologist ('PW7') testified that Kamaljit had died from asphyxia due to manual strangulation and Ishlyn from asphyxia due to obstruction of the upper airways. He noted scratches and abrasions on Kamaljit's neck and defensive wounds on her hands. The investigating officer ('PW12') testified that he noticed scratch marks on the appellant's face, and that the appellant did not appear to have been affected by the death of his wife and child, and did not even ask to see their bodies, which aroused suspicion. There was also evidence that the appellant's DNA was found on Kamaljit's fingernails. The trial judge found that the prosecution had established a *prima facie* case against the appellant on the charges preferred against him and called upon him to make his defence. The appellant, in his defence, maintained that Kamaljit and Ishlyn were asleep when he left the house at around 3.55am that morning and went to one Restoran Ali for breakfast. He was at the restaurant until 5.10am and then proceeded to his workplace. He maintained that he was not at home when the deceased and child were killed and alleged that an intruder had come in after he had left for work and killed them. As regards the injuries on his face, the appellant stated that he sustained the same as a result of his child throwing a toy at him when he was playing with her and as for the presence of his DNA on the deceased's fingernails, he explained that this was because he had made love to the deceased the previous night. The trial judge found the appellant's defence of alibi a fabrication and that his whole defence lacked credence. The trial judge accepted the prosecution's account that there was no forced entry and that the appellant had killed Kamaljit and Ishlyn and then staged the crime scene to look like a robbery. In the appellant's appeals, he raised the following main grounds (i) his conviction for the murder of Ishlyn was unsafe as there was no credible evidence on the cause of her death; (ii) the trial judge was wrong in coming to the conclusion that there was no evidence of forced entry; (iii) the trial judge was wrong in rejecting the

defence of alibi; and (iv) the trial judge's failure to indicate which limb of s. 300 of the PC the prosecution had proven the charges was a serious omission.

Held (setting aside conviction and sentence under s. 302 of the Penal Code; finding accused guilty of lesser charge of culpable homicide not amounting to murder under s. 299, and convicting on a reduced charge under s. 304(a))
Per SM Komathy Suppiah JCA delivering the judgment of the court:

- (1) The pathologist certified the child's cause of death to be asphyxia due to upper airways obstruction and the post-mortem report indicated the presence of milk in Ishlyn's lungs. The pathologist was unable to express any conclusive opinion on the cause of death of Ishlyn, hence the benefit of the doubt must be given to the appellant. There was reasonable doubt that the appellant had caused the death of Ishlyn by smothering her in light of the concession by the pathologist that Ishlyn could have choked to death. The trial judge had failed to sufficiently consider this evidence. Such failure was a misdirection which merited appellate intervention. The conviction was unsafe and ought to be set aside as it was not proven on the evidence that the child's death was homicidal. (paras 27-29)
- (2) There was no evidence of any forced entry. If indeed the appellant had padlocked the grill door, it was incredible that his fingerprints were not on it. The evidence supported the trial judge's conclusion that the appellant had staged the crime scene to justify his killing of Kamaljit. There was also no merit in the appellant's complaint that there was no proper investigation carried out to verify his allegation that an intruder had killed Kamaljit. There were no compelling reasons to disturb the trial judge's findings on this aspect of the case. (para 32)
- (3) There was no merit in the submission by the appellant that the trial judge had failed to consider that the pathologist had conceded during cross-examination that Kamaljit's time of death may have been around 7.30am to 10.30am and this would necessarily mean that Kamaljit was alive when the appellant left for work. There was unchallenged evidence that the family was unable to reach Kamaljit that morning. She was supposed to have met the family members at 6.30am that morning at the Sikh temple. There was no reason for Kamaljit not to have answered the calls unless she was already dead by then. (paras 33 & 34)
- (4) Section 402 of the Criminal Procedure Code requires an accused person who wishes to raise the defence of alibi to put it up as soon as possible, and give the names of the witnesses who saw him at the crucial time to enable the police to investigate immediately after the incident as memories fade with time. If he makes the disclosure at a belated stage, then he cannot expect any help from the police as it becomes difficult to trace the witnesses. The notice of alibi in this case was served on the

- A prosecution on 14 April 2019, three years after the incident, in the midst of the trial. The notice did not give names of anyone the appellant had met at Restoran Ali who could corroborate his defence of alibi. When the new investigating officer PW16 went to Restoran Ali to investigate the appellant's alibi, there was no restaurant at the address given. It was a shophouse. The appellant, by not disclosing his defence of alibi at or about the time of his arrest during police interrogation, made it difficult for the police to check the veracity of his version of the facts. (paras 35-37)
- B
- C (5) The entire plea of alibi fell to the ground in view of the evidence of PW9 who had stated that the appellant's car was still parked in front of his home around 4.30 am in the morning, contrary to the appellant's claim that he had left for work at 3.55am. Upon acceptance of PW9's testimony and his statement was found to be trustworthy, as rightly found by the trial judge, then the plea of alibi raised by the appellant became unsustainable. The positive identification by PW9 that affirmatively placed the appellant at the scene of the crime at the time and date stated in the charge effectively destroyed the appellant's defence of alibi. When an accused raises an alibi, his case sinks or floats on the success of that defence. In this case, the appellant's defence was doomed to failure on account of the collapse of the alibi defence. (para 39)
- D
- E
- F (6) There was overwhelming evidence which showed that it was the appellant who had strangled Kamaljit and caused her death. Kamaljit's internal neck injuries could only have been caused by the application of significant or severe force. This showed that the appellant had intended to inflict the bodily injury on the deceased and the injury was sufficient in the ordinary course of nature to cause death. (para 41)
- G
- H (7) It is incumbent on the prosecution to specify in its opening address or early in the trial which limb it was relying on and also for the court to indicate which limb of s. 300 of the PC had been proven when defence is called. This would assist the defence in conducting its cross-examination and thereby avoid a waste of judicial time. Absent such an indication, an accused person would be deprived of the notice of the case he had to answer in his defence. The failure of the trial judge to specify or otherwise indicate the limb of s. 300 constituted a serious error as the appellant had been prejudiced and denied a fair trial. In the circumstances, it would not be safe to affirm the appellant's conviction for murder under s. 302 of the PC. Thus, the conviction and sentence under s. 302 of the PC was set aside. The appellant was found guilty of a lesser charge of culpable homicide not amounting to murder under s. 299, and was convicted on the reduced charge under s. 304(a) of the PC. (paras 46-50)
- I

Case(s) referred to:

Dhivyaprabu Panir Selvam v. PP [2022] 1 CLJU 1088; [2022] 1 LNS 1088 CA (*refd*)
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC (*refd*)
Fong Kong Meng & Anor v. PP [2019] 9 CLJ 301 FC (*refd*)
Tee Hock Keong v. PP [2021] CLJU 497; [2021] 1 LNS 497 CA (*refd*)
Teng Boon How v. PP [1993] 4 CLJ 545 SC (*refd*)
Zulkipple Mohamad v. PP [2021] 1 CLJ 673 FC (*refd*)

Legislation referred to:

Criminal Procedure Code, s. 402
 Penal Code, ss. 299, 300(c), 302, 304(a)

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For the respondent - Nahra Dollah; DPP
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[Editor's note: *For the High Court judgment, please see PP lwn. Satvender Singh Pirthpal Singh* [2021] CLJU 2624; [2021] 1 LNS 2624 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT**SM Komathy Suppiah JCA:****Introduction**

[1] There are two appeals before us. The appellant was convicted and sentenced to death by the High Court, for two offences under s. 302 of the Penal Code for the murder of his wife, Kamaljit Dorairaja (Kamaljit), and his six month old daughter, Ishlyn Kaur (Ishlyn) on the morning of 14 April 2016 at their home. The appellant being dissatisfied with the two decisions appealed to this court.

[2] The charges on which the appellant was convicted read as follows:

Bahawa kamu pada 14hb April 2016 jam di antara 3.55 pagi hingga 4.15 pagi bertempat di rumah No. 31, Jalan RP 10/9, Taman Rawang Perdana 2, Rawang, di dalam Daerah Gombak, di dalam Negeri Selangor Darul Ehsan telah melakukan pembunuhan ke atas Kamaljit A/P Dorairaja dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

Bahawa kamu pada 14hb April 2016 jam di antara 3.55 pagi hingga 4.15 pagi bertempat di rumah No. 31, Jalan RP 10/9, Taman Rawang Perdana 2, Rawang, di dalam Daerah Gombak, di dalam Negeri Selangor Darul Ehsan telah melakukan pembunuhan ke atas Ishlyn Kaur a/p Satvender Singh dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

(emphasis added)

A Background Facts

B [3] The circumstances which led to the appellant's conviction were briefly as follows. At the material time, the appellant lived with his wife and only daughter in a rented double storey house in Rawang. There was a small fence dividing their property and that of his immediate neighbour SP8 who lived there with her husband, SP9 and brother-in-law, SP10.

C [4] On the morning of 14 April 2016, the appellant's family members became anxious when Kamaljit failed to show up at the Sikh temple as pre-arranged. All phone calls to her went unanswered. Whereupon, they contacted the appellant's father (PW15) close to 8am and sought his help to drive over to the appellant's home to check on Kamaljit.

D [5] PW15 arrived at the appellant's home about 10.30am. As the front door was locked, PW15 sought the assistance of the neighbour, PW8, to enter the house through the back grill door that was open. On going upstairs, they found the bodies of Kamaljit and Ishlyn in the second bedroom.

E [6] Kamaljit had strangulation marks on her neck and was on the floor, whilst Ishlyn was on the bed. There were pillows and a milk bottle next to Ishlyn. The appellant was not at home at the time. PW8 contacted the police. The appellant was arrested the same day and later charged with the murder of Kamaljit and Ishlyn. He maintained he had left home at 3.55am on the morning in question and was not at home when his wife and daughter were killed.

F [7] The prosecution called 16 witnesses to prove the charges against the appellant. It was the case for the prosecution that the appellant had killed Kamaljit and Ishlyn and then staged the crime scene to look like a robbery. The prosecution's case against the appellant was based on circumstantial evidence as there was no eyewitness.

G [8] PW9 and PW10, as mentioned at [3] were the appellant's immediate neighbours. According to PW10, on the morning of 14 April 2016, he was watching a football game that started around 2.45am. There was a 15-minute interval at around 3.30am when he came out of his house to have a smoke. Whilst smoking, he saw the appellant come out of his house but was surprised to see him dash inside on seeing him. PW10 was confused by the appellant's conduct as the latter would always greet him on seeing him.

H PW10 continued smoking and thereafter went inside to watch the game.

I [9] PW10's evidence was corroborated by his brother PW9 who arrived home in Rawang from Penang around 4.30am that morning. PW9 testified that the appellant and Kamaljit's cars were still parked outside their house at this time.

[10] The other important witnesses called were the pathologist (PW7), the appellant's employer (PW11), the investigating officer (PW12), the landlord (PW3), Inspector Shahfaezal (PW5) and the deceased's mother (PW4). A

[11] The pathologist testified that Kamaljit had died from asphyxia due to manual strangulation and Ishlyn from asphyxia due to obstruction of the upper airways. He noted scratches and abrasions on Kamaljit's neck and defensive wounds on her hands. B

[12] PW11 testified that the CCTV footage at the appellant's place of work showed that the appellant, a lorry driver, had come to work at 5.24am that morning. According to PW11, it was rare for the appellant to come to work early as his routine was to come in between 8 to 9am. There was evidence that the appellant's workplace was some 20 minutes away from his home. C

[13] The investigating officer testified that when he arrived, he entered the house through the back door. There was a padlock (P14A) on the floor with cut marks and a bunch of keys on the grill door. None of the keys could be used to open P14A. He inspected the house and it appeared to have been ransacked. According to investigating officer, the appellant arrived at the crime scene around 3pm. He noticed scratch marks on the appellant's face, and that the appellant did not appear to have been affected by the death of his wife and child, and did not even ask to see their bodies. This aroused his suspicion and the appellant was later arrested. D E

[14] The landlord testified that it was not possible for an intruder to have broken the grill door to enter the house because of the two steel plates on the grill door.

[15] The next witness was Inspector Shahfaezal (PW5) who testified that the appellant had informed him that he had locked the back grill door using a padlock (P14A) the previous night, and an intruder must have cut it to open the grill door and gain entry into the house. With the help of big and small cutters, PW5 tried to test if it was possible for an intruder to cut open a padlock that was inside the house from the outside. He found that it could not be done as the square designs on the top part of the grill were small and this would have made it difficult for anyone from outside to put the cutter through to cut the padlock that was on the inside of the grill door. F G

[16] Kamaljit's mother (PW4) testified that she was the nominated beneficiary in respect of Kamaljit's KWSP and insurance. However, she discovered that one week before her death, Kamaljit had changed it to the appellant's name. She also stated that there were matrimonial problems between the deceased and appellant and that her daughter had complained of domestic violence. H

[17] There was also evidence that the appellant's DNA was found on her fingernails. I

A [18] Having considered the prosecution evidence on maximum evaluation and credibility of prosecution witnesses, the trial judge found that the prosecution had established a *prima facie* case against the appellant on the charges preferred against him and called upon him to make his defence.

B [19] The appellant gave his evidence on oath and called four witnesses. In his defence, he maintained that Kamaljit and Ishlyn were asleep when he left the house at around 3.55am that morning and went to one Restoran Ali for breakfast. He was at the restaurant until 5.10am and then proceeded to, his workplace. At 5.40am, he drove a lorry tanker to the Shell depot in Port Dickson.

C [20] He maintained that he was not at home when the deceased and child were killed and alleged that an intruder had come in after he had left for work. He accepted that PW10 had seen him that morning when he came out of the house, but explained he went back into the house as the latter was smoking and he did not like the smell of smoke.

D [21] As regards the injuries on his face, the appellant stated that he sustained the same as a result of his child throwing a ladybird toy at him the previous night when he was playing with her. As for the presence of his DNA on the deceased's fingernails, he explained this was because he had made love to the deceased the previous night.

E [22] The appellant called his aunt (DW3), sister (DW2), neighbour (DW4) and lawyer (DW5) as witnesses. These witnesses had come to the crime scene after being informed of the incident.

The Trial Court's Decision

F [23] In convicting the appellant, the learned trial judge found his defence of alibi was a fabrication. He rejected the appellant's story that an intruder had come into the house and killed Kamaljit and Ishlyn. The trial judge accepted the prosecution's account that there was no forced entry and that the appellant had killed Kamaljit and Ishlyn and then staged the crime scene to look like a robbery. He found the appellant's defence was lacking in credence. The trial judge did not accept the appellant's explanation for the injuries on his face and his conduct in running back into the house on seeing PW10 on the morning in question. He found these false explanations pointed to his guilt.

H [24] The trial judge further noted that though the appellant was the last person to have seen Kamaljit and Ishlyn but advanced no explanation how and in what circumstances they had died or if he had anything to do with it. This was another piece of evidence that pointed to his guilt.

I

Grounds Of Appeal

[25] Before us, the appellant raised the following main grounds before us:

- (i) his conviction for the murder of Ishlyn was unsafe as there was no credible evidence on the cause of her death;
- (ii) the trial judge was wrong in coming to the conclusion that there was no evidence of forced entry;
- (iii) the trial judge was wrong in rejecting the defence of alibi; and
- (iv) the trial judge's failure to indicate which limb of s. 300 of the Penal Code the prosecution had proven the charges was a serious omission.

[26] We will deal with these issues *seriatim*.

Cause Of Death Of Child

[27] It is contended by counsel for the appellant there was no credible evidence on the cause of death of Ishlyn. The pathologist had certified her cause of death to be asphyxia due to upper airways obstruction. That finding was not disputed. The point of contention was the cause of the obstruction. It was the case for the prosecution that the obstruction of the airway was caused by smothering.

[28] The counsel pointed out that the post-mortem report indicated the presence of milk in Ishlyn lungs. As noted earlier, there is evidence in this case the police found a milk bottle on the bed next to Ishlyn. Under cross-examination, the pathologist acknowledged that the presence of milk in the lungs indicated that Ishlyn may have died as a result of choking on the milk. In re-examination, the pathologist said:

S: Tadi ada rujuk gambar N, tadi Dr telah ditanya Peguambela adakah kemungkinan bayi ini mati kerana tersedak, cuba tengok gambar N, cuba tengok kedudukan bayi ini, bolehkah bayi ini mati dalam keadaan yang tersedak dalam kedudukan ini?

J: Susah sebenarnya untuk saya mengatakan tersedak ataupun tidak tetapi walaupun kita jumpa makanan dalam saluran pernafasan kanak-kanak itu, ceritanya akan berbentuk lain dan kita akan ke arah menunjukkan benda itu lebih kepada accidental. Untuk kes macam ini, kita tak boleh katakan sama ada tersedak atau apa memang kita tak boleh kata.

[29] His answer shows he was unable to express any conclusive opinion on the cause of death of Ishlyn. We are of the view that as there is no conclusive evidence as to the cause of the death, the benefit of the doubt must be given to the appellant. We agree with the submission of the appellant that there was reasonable doubt that the appellant had caused the death of Ishlyn by smothering her in light of the concession by the pathologist that Ishlyn could

A have choked to death. The learned trial judge had failed to sufficiently consider this evidence. Such a failure in our view is a misdirection which merits appellate intervention. In the circumstance, we find the conviction unsafe and set it aside as it was not proven on the evidence that the death was homicidal.

B **Forced Entry**

[30] That brings us next to the appellant's contention that the trial judge's finding that there was no forced entry is contrary to the evidence in this case. It is contended that in arriving at this finding the learned trial judge had failed to consider the fact that the house had been ransacked and no proper investigation was done to investigate the appellant's allegation that he had padlocked the back door with P14A when he left for work that morning.

[31] In his grounds of judgement, the judge gave the following reasons for disbelieving the appellant's allegation:

D [46] Daripada keterangan-keterangan ikut keadaan yang dikemukakan mahkamah mendapati pintu belakang rumah tempat kejadian ditutup dengan gril yang berpetak kecil dan dilekatkan dengan 'steel plate'.

E Terdapat dua bahagian 'steel plate', di mana bahagian atas 'steel plate' boleh dibuka tetapi bahagian bawah tidak boleh dibuka kerana ianya dipasang mati bersama gril. Saya menerima keterangan SP7 yang menyatakan pintu belakang rumahnya tidak boleh dibuka kecuali bahagian kedua 'steel plate' yang dilekatkan pada gril dipecahkan.

F [47] SP5 juga telah menjalankan ujian di tempat kejadian pada 14 April 2016 dengan kehadiran OKT di mana beliau mendapati cutter besar dan cutter kecil tidak boleh memotong mangga yang dikunci dari dalam.

G [48] Di atas lantai berdekatan pintu belakang rumah dijumpai mangga yang mempunyai kesan potongan (P14A) dan juga serangkai kunci mengandungi sebanyak 11 anak kunci dijumpai di lubang pintu gril. Namun, kesemua 11 anak kunci yang dijumpai di lubang gril tersebut tidak berpadanan dengan mangga P14A. Mahkamah mendapati mangga (P14A) bukanlah mangga yang digunakan untuk mengunci dari dalam memandangkan kesemua 11 anak kunci yang ditemui di lubang pintu gril tidak berpadanan dengan mangga tersebut. Di mangga tersebut juga tiadanya profil DNA OKT dan Kamaljit yang merupakan penghuni rumah tersebut. Berdasarkan fakta bahawa cutter sama ada besar atau kecil tidak boleh memasuki petak kecil untuk memotong mangga yang mengunci gril, kunci yang ditemui di lubang kunci tidak sepadan dengan P14 dan ketiadaan DNA Kamaljit serta OKT di P14A ada selamat untuk saya membuat dapatan fakta berdasarkan inferens bahawa P14A sengaja diletakkan berdekatan di pintu belakang untuk menunjukkan seolah-olah berlaku pecah masuk ke atas rumah OKT.

I ...

[100] Berbalik kepada kes ini, OKT menyatakan mangga yang terdapat kesan potongan (P14A) adalah merupakan mangga yang OKT gunakan untuk mengunci pintu grill belakang pada malam 14.04.2016 kerana pada mangga ini terdapatnya tulisan “Knight” dan “360”. OKT seterusnya menegaskan beliau tidak pernah sama sekali pada malam 14.4.2016 memotong mangga itu.

A

[101] Mahkamah menolak keterangan OKT bahawa mangga P14A adalah mangga yang OKT gunakan untuk mengunci pintu grill belakang pada malam 14.4.2016 kerana tiada satupun daripada 11 anak kunci yang didapati berada di lubang grill tidak berpadanan dengan mangga tersebut. Keduanya, tidak ada profil DNA OKT mahupun si mati pada P14A. Keterangan menunjukkan adanya dua (2) profil DNA campuran yang didapati daripada mangga tersebut terdiri daripada dua orang penyumbang mengenepikan OKT, Kamaljit dan Ishlyn.

B

C

[32] Having assessed the trial judge’s evaluation of the evidence, we agree with his conclusion that there was no evidence of any forced entry. If indeed the appellant had padlocked the grill door with P14A, it was incredible that his fingerprints were not on it. In our view, the evidence supports the learned trial judge’s conclusion that the appellant had staged the crime scene to justify his killing of Kamaljit. We also find no merit in the appellant’s complaint that there was no proper investigation carried out to verify his allegation that an intruder had killed Kamaljit. There are no compelling reasons to disturb the trial judge’s findings on this aspect of the case.

D

E

Defence Of Alibi

[33] Turning now to the ground of appeal relating to alibi. It is the appellant’s contention that the trial judge erred in rejecting his defence of alibi as there was no clear evidence as to time of Kamaljit’s death. It is argued that the evidence given by the pathologist did not support the prosecution’s case that Kamaljit had died between 3.55am to 4.15am as stated in the charge. It is said the trial judge had failed to consider that the pathologist had conceded during cross-examination that Kamaljit ‘s time of death may have been around 7.30am to 10.30am and this would necessarily mean that Kamaljit was alive when the appellant left for work.

F

G

[34] We find no merit in the submission. There is unchallenged evidence that the appellant’s family was unable to reach Kamaljit that morning. She was supposed to have met the family members at 6.30am that morning at the Sikh temple. There was no reason for Kamaljit not to have answered the calls unless she was already dead by then.

H

[35] It is next contended by the appellant that the trial judge was wrong in rejecting his defence of alibi. The notice of alibi in this case was served on the prosecution on 14 April 2019, some three years after the incident, in the midst of the trial. The notice did not give names of anyone the appellant had met at Restoran Ali who could corroborate his defence of alibi.

I

- A [36] Section 402 of the Criminal Procedure Code requires an accused person who wishes to raise the defence of alibi to put it up as soon as possible, and give the names of witnesses who saw him at the crucial time to enable the police to investigate immediately after the incident as memories fade with time. If he makes the disclosure at a belated stage, then he cannot expect any help from the police as it becomes difficult to trace the witnesses.
- B [37] There is unchallenged evidence that when the new investigating officer, PW16 went to Restoran Ali to investigate the appellant's alibi, there was no restaurant at the address given. It was a shophouse. It cannot be gainsaid that the appellant by not disclosing his defence of alibi at or about the time of his arrest during police interrogation, made it difficult for the police to check the veracity of his version of the facts. See *Teng Boon How v. PP* [1993] 4 CLJ 545; [1993] 3 MLJ 553.
- C [38] The learned trial judge after evaluating the alibi defence, disbelieved the appellant and found it to be a sham. This is a finding of fact, premised on the evidence adduced. The trial judge found that the evidence adduced by the appellant to prove the plea of alibi was sketchy and in fact did not stand to reason. We have examined the basis of those findings and we have no reason to disagree with him.
- D [39] In our judgment, the entire plea of alibi falls to the ground in view of the evidence of PW9 who had stated that appellant's car was still parked in front of his home around 4.30am in the morning, contrary to the appellant's claim he had left for work at 3.55am. PW9's testimony was accepted by the trial judge. Upon acceptance of PW9's testimony and his statement is found to be trustworthy, as rightly found by the trial judge, then the plea of alibi raised by the appellant became unsustainable. The positive identification by PW9 that affirmatively placed the appellant at the scene of the crime at the time and date stated in the charge effectively destroyed the appellant's defence of alibi. See: *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLJ 49. When an accused raises alibi, his case sinks or floats on the success of that defence. In this case, the appellant's defence is doomed to failure on account of the collapse of the alibi defence. See *Tee Hock Keong v. PP* [2021] CLJU 497; [2021] 1 LNS 497.
- E [40] The trial judge also found that the appellant's explanation for running back into his house on seeing PW10 was wholly unconvincing and did not make any sense. Equally, the trial judge disbelieved the appellant's explanation for the injuries on his face. We share the trial judge's view that the appellant's lies and suspicious conduct were corroborative of the prosecution case. The false defence of alibi the appellant sought to rely on indeed forms a vital link in the chain of circumstances pointing to his guilt.
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[41] Having reviewed the evidence in this case, we agree with the trial judge that there is overwhelming evidence that shows that it was the appellant who had strangled Kamaljit and caused her death. Kamaljit's internal neck injuries could only have been caused by the application of significant or severe force. This shows that the appellant had intended to inflict the bodily injury on the deceased and the injury was sufficient in the ordinary course of nature to cause death.

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Failure To Indicate Which Limb Of Section 300 PC Was Proven

[42] Turning now to the last ground of appeal. It is contended that the trial judge did not indicate which limb of s. 300 the prosecution had proven in calling for defence. The appellant says he has been prejudiced and denied a fair trial by this omission.

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[43] In the present case, there is nothing in the notes of proceedings to indicate the basis on which the prosecution sought a conviction of the appellant. There are no records of any submission made by the prosecution to indicate which limb of s. 300 it was relying on. Neither is there anything in the notes or grounds of judgment to indicate under which limb of s. 300 the appellant was called to make his defence or convicted thereafter. There are four limbs to s. 300. It was only during the proceedings in the Court of Appeal that the prosecution made reference to s. 300(c) of the Penal Code.

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[44] It is trite that if the prosecution's case at trial had proceeded as a s. 300(a) case, the appellant would have had the opportunity to challenge any suggestion that he had intended to cause the deceased's death. Whereas in a case under s. 300(c), the appellant would have had the opportunity to challenge the suggestion that he had the intention to cause such injuries which were sufficient in the ordinary course of nature to cause death. This opportunity was denied to the appellant because there was no indication at any stage during the trial from the prosecution and the trial court as to which limb had been proven.

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[45] In *Zulkiplé Mohamad v. PP* [2021] 1 CLJ 673, the Federal Court explained the limbs to s. 300:

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The intention or the *mens rea* element of murder under cl (c) of s. 300 of the Penal Code must not be coalesced with the intention or the *mens rea* element of murder under cl (a). Under cl (a), death is the intended consequence and death results as intended, whereas under cl (c), death is not the intended consequence but death results, not because death is intended, but because the bodily injury intended to be inflicted is of a kind that is sufficient in the ordinary course of nature to cause death.

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A [46] We accept that there is no requirement in law to specify the limb being
relied on in the charge. However, we are of the view that is incumbent on
the prosecution to specify in its opening address or early in the trial which
limb it is relying on and also for the court to indicate which limb of s. 300
of the Penal Code has been proven when defence is called. This would surely
B assist the defence in conducting its cross examination and thereby avoid a
waste of judicial time. Absent such an indication, an accused person would
be deprived of the notice of the case he has to answer in his defence.

C [47] In our judgment, the failure of the trial judge to specify or otherwise
indicate the limb of s. 300 constitutes a serious error as the appellant has been
prejudiced and denied a fair trial. This is exemplified by the decisions of the
Court of Appeal in *Dhivyaprabu Panir Selvam v. PP* [2022] CLJU 1088; [2022]
1 LNS 1088 and the Federal Court in *Fong Kong Meng & Anor v. PP* [2019]
9 CLJ 301.

D [48] In *Dhivyaprabu Panir Selvam v. PP*, it was observed:

E Prior to the commencement of the trial, the prosecution asserted through
its opening speech (Exhibit P3) that it would be relying on limbs (a) or (d)
of section 300 in proving the case against the Appellant. Though it may
not be binding on the prosecution, to our mind such statement carries
significance as the opening speech would provide a guide on the evidence
which would be led during the prosecution case, and also as an indication
or notice to the Appellant on the case that would be proved against him.
Instead, we find after closing its case, the prosecution altered its position
and relied instead on section 300(a) and (c) of the Penal Code in its
written submission. At the end of the prosecution case, the *learned trial*
F judge found that the prosecution had successfully proven a *prima facie*
case against the Appellant. In arriving at such finding, the learned trial
judge held that all the limbs of section 300 were successfully proven by
the prosecution.

G It is our considered view that such course of conduct in not electing a
particular limb of section 300 is unjust and would deprive the Appellant
of a fair trial. This is because the exceptions housed under section 300
cater for different circumstances. More pertinently, it contained different
elements required to be proven to turn mere culpable homicide into the
more aggravated offence of murder. Eventually, the evidence required to
be proved for each exception and the corresponding evidential “burden”
on the accused to raise a reasonable doubt on such exception would also
H be different. As such the court must not only make an election on the
applicable limb, but such election must also be made known to the accused
– see *Fong Kong Meng & Anor v. PP* [2019] 9 CLJ 301.

I [49] In the circumstances, we are of the view it would not be safe to affirm
the appellant’s conviction for murder under s. 302 of the Penal Code.

Conclusion

[50] For this reason, in the exercise of our appellate powers, we set aside the conviction and sentence under s. 302. We find the appellant guilty of a lesser charge of culpable homicide not amounting to murder under s. 299, and convict him on the reduced charge under s. 304(a) of the Penal Code. We further find that a 20-year imprisonment term is warranted on the facts of this case.

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